SERVED: April 4, 2005

NTSB Order No. EA-5150

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of March, 2005

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. DAVID MICHAEL REID, Respondent.	Docket CP-125

OPINION AND ORDER

Respondent has appealed from an order entering summary judgment in favor of the Administrator, issued by Administrative Law Judge William A. Pope, II, on May 20, 2004.[1] We deny the appeal and affirm the assessment of a $5,000 civil penalty against respondent.

On July 1, 2003, the Administrator issued an order assessing a $5,000 civil penalty against respondent, based on his failure to surrender his pilot and medical certificates following an earlier (unappealed) order, dated March 31, 2000, that suspended

[1] A copy of the order is attached.

his pilot certificate for 120 days and revoked his medical certificate. The suspension and revocation were based on his failure to report an alcohol-related motor vehicle action and his falsification of a January 12, 1998, medical application by failing to report a 1997 conviction for driving while intoxicated (DUI) and a related driver's license suspension.[2] The order of assessment alleged violations of 14 CFR 61.19(f) and 67.415,[3] and noted that respondent had received two letters directing him to surrender the suspended and revoked certificates and advising him that if he did not he would be subject to a civil penalty of up to $1,100 for each day he did not surrender them.

In response to the Administrator's earlier notice proposing to assess the $5,000 civil penalty, respondent had challenged the charges upon which the underlying suspension and revocation were based, disputing the premise that he had ever made a deliberate misrepresentation on a medical application. In an earlier letter, dated June 29, 2001, which respondent had written in response to the FAA's first letter advising him to surrender his suspended/revoked certificates, he had also denied committing any

[2] The order of suspension and revocation cited violations of 14 CFR 61.15(e) (which requires reporting of motor vehicle actions to the FAA Civil Aviation Security Division within 60 days after the action) and 67.403(a)(1) (which prohibits the making of false statements on an application for a medical certificate).

[3] Section 61.19(f) states that a certificate ceases to be effective if it is surrendered, suspended, or revoked. Section 67.415 states that the holder of a medical certificate that is suspended or revoked shall return it to the Administrator upon request.

offense, and asked how his certificates could have been revoked/suspended, "without my knowledge or presence at a hearing or in a court of law."

Respondent subsequently filed a timely notice of appeal from the July 1 order of assessment. The Administrator moved to dismiss respondent's appeal, arguing that he had no basis for attacking the underlying order of suspension/revocation and that, therefore, he had no basis for contesting the resulting assessment of a civil penalty for failure to surrender his suspended/revoked certificates. The law judge entered summary judgment in favor of the Administrator, finding that: (1) respondent had constructive service of the March 31, 2000, order suspending/revoking his certificates; (2) because he failed to file a timely appeal from that order, it was final and not now open to attack; (3) respondent ignored repeated warnings that if he did not surrender his certificates a civil penalty action could be filed against him; and (4) the $5,000 civil penalty was de minimus compared to the amount the Administrator could have ordered in light of the extended length of time for which respondent had refused to surrender his certificates. Accordingly, the law judge found that there was no basis for respondent to contest the appropriateness of the $5,000 civil penalty and that the Administrator was entitled to summary judgment as a matter of law.

Respondent's appeal brief consists almost entirely of assertions relating to the March 2000 order of

suspension/revocation. Specifically, he asks that we, "take the time necessary to recognize that the original complaint against me never occurred … at no time was there ever a 'fraudulent or intentionally' false statement." Respondent notes that during his June 1999 informal conference with an FAA attorney, preceding the issuance of the March 2000 order of suspension/revocation, he stated that he, "would not accept any form or degree of punishment in this matter, as I was innocent as charged." Respondent denies that he has selectively signed for certified mail or tried to dodge service or avoid the consequences of his conduct, as the Administrator asserted in the motion to dismiss, and concludes that, "given my day in court … all will unfold exactly as it should to the satisfaction of all concerned."

In reply, the Administrator points out that the FAA properly served respondent with the March 31, 2000, order of suspension and revocation by sending it via certified mail to his address of record, and cites the FAA's governing statute (at 49 U.S.C. 46103(b)(1)), which states that service of notice and process in enforcement proceedings may be made by certified or registered mail, and that the date of service is the date of mailing.[4] The order was returned to the FAA as "unclaimed" on May 9, 2000, and

[4] We recognized in Administrator v. Corrigan, NTSB Order No. EA-4806 (1999), that this statute governs the FAA's service of orders in enforcement actions. Our own rules of practice (49 CFR Part 821) and precedent govern service of subsequent documents in cases that are appealed to the Board. However, it should be noted that certified mail returned "unclaimed" constitutes constructive service under both standards; accordingly, the outcome in this case would be the same regardless of which statutory or regulatory standard was applied.

re-mailed to his address of record by regular mail that same day. The re-mailed copy was not returned. (It is apparent from the record that respondent has received many documents from the FAA that were sent to his address of record by both certified and regular mail.) Accordingly, the Administrator argues that this constitutes, at a minimum, constructive service on respondent of the order of suspension and revocation. The Administrator contends that the law judge's grant of summary judgment was appropriate because there were no genuine issues of material fact and the $5,000 civil penalty is well within the amount authorized by law.

We agree with the Administrator. Respondent had an opportunity to request an evidentiary hearing and to have his "day in court." However, he failed to take advantage of that opportunity. It is too late now for respondent to contest the charges underlying the suspension of his pilot certificate and the revocation of his medical certificate. A respondent forfeits his right to challenge an earlier order in a proceeding by failing to appeal it at the appropriate time, and through the appropriate procedures. Administrator v. Mauch, NTSB Order No. EA-4881 (2001). Regardless of whether the 20-day appeal period is calculated from the date the FAA mailed the first copy sent by certified mail on March 31, 2000, or the second copy sent by regular mail on May 9, 2000, it is clear that no timely appeal was filed. In fact, respondent did not appeal from the order of suspension/revocation until more than three years later, when he

referenced the case number in his July 18, 2003, notice of appeal from the order of assessment.

Further, regardless of whether respondent actually received the order of suspension/revocation with which he was constructively served, it is undisputed that respondent received actual service of the June 17, 1998, notice of proposed certificate action (verified by his signature dated June 20, 1998, on the return receipt for the certified mailing). This notice informed him of his right to appeal any subsequently-issued order to the NTSB and to receive an evidentiary hearing before an NTSB administrative law judge. Therefore, even if respondent first learned that such an order had been issued after the 20-day appeal period had expired, he could have promptly indicated his desire to appeal the order to the NTSB at that time, and attempted to establish that good cause existed for the untimeliness of the appeal.[5] However, he did not do so. At no time has respondent provided any explanation at all for his purported non-receipt of the order of suspension and revocation that was sent from the FAA by both certified and regular mail to the same address where he clearly received many other items sent from the FAA using those same methods.

Finally, even if respondent's challenge to the charges in the underlying order of suspension/revocation was properly before

[5] The success of any such good cause argument would, of course, have depended on the nature of respondent's explanation of his failure to receive the orders that were earlier sent to him at his address of record by certified and regular mail.

us, he has not provided us with any basis for overturning those charges. Specifically, in none of his filings or correspondence in either proceeding has respondent disputed that he had a DUI conviction in 1997 and a related driver's license suspension.[6] Nor has he asserted that he disclosed this DUI and driver's license suspension on his January 1998 medical application,[7] or that he reported it to the FAA's security office, as was required. To the contrary, information in the docket file indicates that respondent told the FAA attorney during his June 1999 informal conference that he did not believe he was required to report this information on the medical application, and that he was not aware of the security reporting requirement.

In sum, given the finality of the suspension/revocation, and respondent's uncontested refusal to surrender his certificates, he has presented no basis for challenging the law judge's grant of summary judgment and the imposition of the $5,000 civil penalty.

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[6] This also appears to be verified by documentation from the Florida State Department of Highway Safety and Motor Vehicles attached to the Administrator's reply brief.

[7] The January 12, 1998, application is not a part of the docket file. However, the Administrator asserts in her reply brief that respondent checked "yes" in response to item 1.18.v., and stated "previously reported" in the remarks section. However, the information does not appear to have been previously reported. His last medical application (dated January 11, 1996), which is in the docket file, was completed before the subject DUI conviction and suspension and, therefore, obviously does not include that information.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's order entering summary judgment is affirmed insofar as it is consistent with this opinion and order; and

3. The Administrator's order assessing a $5,000 civil penalty is affirmed.

ROSENKER, Acting Chairman, and CARMODY, ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.